Supreme Court, U.S.
FILED
OCT 2 - 2003
OFFICE OF THE CLERK

No. 03-173

In the

Supreme Court of the United States

IN RE: WILLIAM A. TOTO

Petition for a Writ of Mandamus to the
The United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF

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Nemesis offers no plausible, legally permissible reason for the Eleventh Circuit's decision.

In the Petition, we posited three possible "guesses" for the Eleventh Circuit's peremptory denial of all appellate fees, without explanation. To these, Nemesis Veritas has added several more. However, as we show below, none of these possible "reasons" hold up under even a superficial analysis and are, therefore, highly unlikely to have been the unstated predicate for the Eleventh Circuit's Order.

First of all, there is no reason to believe, as Nemesis argues, that the Eleventh Circuit "agreed with the reasons" which Nemesis' proffered in opposition below and "obviously denied petitioner's motions for appellate fees for [such] reasons." See, Opposition Brief, pp. 3, 7 - 8. This is, first, because the Eleventh Circuit gave absolutely no reason for its decision and, second, because these arguments, rehashed here at Opposition Brief, pp. 8 - 12, are specious and illogical, relate primarily to the "amount" of fees to be awarded (as to which there *is* a discretion and which is *not* at issue here) and not to the right to an award in some amount (as to which there is *no* discretion and which *is* the issue here) and cannot be presumed to have been seriously entertained by the Eleventh Circuit for a single moment.

For instance, Nemesis surmises that perhaps the Eleventh Circuit did not regard Mr. Toto as the "prevailing party." See, Opposition Brief, pp. 5 – 6. However, the parties are agreed that Mr. Toto defeated Nemesis' claim for $30 million in compensatory damages. On this issue, Mr. Toto was, therefore, clearly the "prevailing party." Mr. Toto also defeated Nemesis'

claim for $60 million in punitive damages.[1] On this, too, Mr. Toto was therefore the "prevailing party." Mr. Toto also won the other major issue in the case, an entitlement to trial fees and expenses under Fla. Stat. § 768.79 and an award of substantially all such fees and expenses. On this too, Mr. Toto was therefore the "prevailing party." Nemesis nevertheless argues, that because the appellate court twice, incorrectly, refused fees before finally being persuaded to rule in Mr. Toto's favor, he was somehow *not* the overall "prevailing party," because he only won the fee issue "in the end." But that is exactly what "prevailing party" means, "the one who wins in the end." For the Eleventh Circuit to have predicated its ruling on any such reason as Nemesis suggests would have been, candidly, bizarre.

Another limb to the argument that Mr. Toto was not the "prevailing party" rests on the fact that although Mr. Toto won on the merits, and won substantially all his fees under Fla. Stat. § 768.79, he failed to persuade the Court of an entitlement to essentially *the same fees* under other statutory bases.[2] See, Opposition Brief at pp. 1, 6. However, Mr. Toto's arguments under these statutes were second and third strings to his bow on the fee issue, which he eventually won on his first-string argument under Fla. Stat. § 768.79. Prevailing on those additional statutory bases would not have gained Mr. Toto a single dollar over his Fla. Stat. § 768.79 award.

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[1] Nemesis has apparently, somehow, forgotten that it demanded $60 million in punitive damages in addition to its $30 million claim for compensatory damages throughout the case, from its initial Complaint, through its First Amended Complaint, and its final, Second Amended Complaint, on which summary judgment was entered, or it would not have stated in its brief that we have "repeatedly mischaracterized the claim as one of $90 million." See, Opposition Brief, p. 1, fn. 1.

[2] Fla. Stat. § 57.105, which sanctions frivolous litigation and 28 U.S.C. § 1927 which sanctions vexatious litigation.

Losing on those subsidiary arguments did not cost Mr. Toto a single dollar. For the Eleventh Circuit to have considered, as Nemesis argues, that the failure to recover on such subsidiary issues rendered the ultimate result a "draw," despite Mr. Toto's defeat of damage claims totaling $90 million and his recovery of substantially all fees requested, would have been outright capricious.

Nemesis also argues that because Mr. Toto was denied appellate fees by the Eleventh Circuit in the course of this appeal, following the initial ruling that Fla. Stat. § 768.79 *did not apply*, that the Court should not have revisited the matter after it reversed itself and held that Fla. Stat. § 768.79 *did apply*, at the end of the appeal. This is as absurd as the foregoing reasons. The facts are as follows. Prior to the first appellate decision in July 2001, Mr. Toto filed a motion seeking appellate attorneys fees and costs under Fla. Stat. § 768.79, in the event that the Court affirmed the District Court on the merits of the $90 million claim and affirmed that the fee statute applied. As it happened, in July 2001, the Eleventh Circuit affirmed on the merits, *but held that the fee statute did not apply*. Given this predicate ruling, Mr. Toto had no entitlement to appellate fees under the statute and the Court properly denied him fees at that time.[3] However, as we know, in the course of the same appeal, the Eleventh Circuit later reversed that predicate ruling and, in November 2002, held that Fla. Stat. § 768.79 *did* apply. As a result of this decision, given Mr. Toto's timely petition, an award of appellate fees in *some* amount became a matter of right which the

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[3] Contrary to Nemesis' argument at Opposition Brief p. 4, given the continuing pendency of proceedings in the Eleventh Circuit for many months thereafter, there was no immediate right of applelate review by this Court, or even a predicate for such review, at the time such fee orders were entered.

Court had no discretion to refuse. Refusal to act on that clear entitlement constituted clear error and an abuse of power.

On this last point of "right" and "discretion" regarding "fees and expenses" under Fla. Stat. § 768.79, and "discretion" as to "taxable costs" under Fed.R.App.P. 39, there is a basic confusion that permeates Nemesis' brief. As the parties agree, Mr. Toto filed an application for fees and expenses, which is generally governed by Fla. Stat. § 768.79 and, at least as to timing, by Fed.R.App.P. 39(d)(1).[4] As the parties are also agreed, Mr. Toto never filed a separate application for "taxable costs,"[5] which would generally be allocated in accordance with Fed.R.App.P. 39(a). Once a Court has determined the existence of the basic criteria for "entitlement" to fees under Fla. Stat. § 768.79, as the Eleventh Circuit did in this case, an award of trial *and* appellate fees is a matter of right and the sole discretion a Court possesses is to determine a "reasonable amount." See, Petition, pp. 8 – 11. Any "discretion" under Fed.R.App.P. 39, if it applies at all to such fee award, is by the terms of the rule itself (which states that it applies unless "the law . . . provides otherwise") subordinate to the mandate of the State statute. It is clear, therefore, that the Eleventh Circuit had no discretion to refuse entry of a fee award in *some* amount.

Four pages of the Opposition brief are, nevertheless devoted to reasons why Mr. Toto's claim for fees and expenses in the sum of $103,901.14 was excessive, which would, according to Nemesis, apparently have justified the Eleventh Circuit in refusing *all* appellate

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[4] See, Petition, p. 11, fn. 11.

[5] See, Opposition Brief, p. 2.

fees. See, Opposition Brief, pp. 9 – 12. This argument is predicated on the alleged fact that fees attributable to litigating "amount" as opposed to "entitlement" are not recoverable; on the alleged failure to show that Mr. Toto had actually paid the fees and expenses demanded; and on the alleged fact that certain relatively minor items of expense, such as LEXIS charges, are not legally recoverable. First of all, we observe parenthetically, the total amount requested reflected a 10% reduction to account for time spent on debating the "amount" of, as opposed to "entitlement to," an award.[6] Second, whether or not the client has paid the fees is irrelevant to the right to recover, and Nemesis cites no law to the contrary. Moreover, as plainly stated in the affidavit of the undersigned, Mr. Toto had, at that time, paid his counsel over $450,000.00 in regard to fees and expenses.[7] More importantly for present purposes, the issue is not whether the Eleventh Circuit had a discretion, bounded by the law and by reason, to determine a reasonable fee for Mr. Toto's expense in having his counsel brief the $90 million merits appeal and the multi-year appellate fight over the application of Fla. Stat. § 768.79,[8] for this discretion it plainly had. What the Court did not have was any power to refuse an award outright. Nemesis' various arguments as to the propriety of line items in the fee application go to "amount," not to "entitlement," and are therefore entirely beside the point.

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[6] See, Petition, App., 97a – 98a; 108a –109a.

[7] See, Petition, App., 107a, para. 19.

[8] Which would be, at a minimum, in a high multiple of the $4,483 allegedly attributable to drawing the Eleventh Circuit's attention to the new Florida case law, as Nemesis suggests. See, Opposition Brief, pp. 2, 10.

The Eleventh Circuit's refusal to enter a fee award under Fla. Stat. § 768.79 is remediable by mandamus.

In sum, Nemesis is unable to give any coherent, legally justifiable reason for the Eleventh Circuit's refusal to award apellate fees and expenses in *some* amount to Mr. Toto. It is unclear what that Court's reasons were for this order, but the most plausible reason among all those proffered is that the Court believed that it had a discretion in the matter. The only apparent, possible source for such a discretion would appear to be Fed.R.App.P. 39. However, that rule is by its terms subordinate to the law and the law mandates entry of an award. Refusal to enter an award in some amount was therefore clear error, an abuse of discretion and a usurpation of power.

Contrary to Nemesis' assertion at Opposition Brief, pp. 3 – 4, that we agree that this issue could have been addressed on a petition for certiorari, such is far from the case. See, Petition, pp. 18 – 19. Had some reason been given for entry of the order, it is possible that a basis for certiorari would have been disclosed – which may have been other than any of the reasons that the parties have raised here. The order under review did not, however, and does not, seem to fit any of the criteria for review by certiorari under Supreme Court Rule 10, even by analogy. Many circumstances surrounding entry of the order did, and do, however, seem to fit the criteria for mandamus. In this regard we point out that at least one court has held that the failure of a lower court to articulate reasons for the exercise of discretion under a statute, when none clearly appear from the record, leads to a conclusion that the lower court must have acted in error, and that mandamus lies to remedy such. *Executive Software North America*,

Inc. v. United States Dist. Court, 24 F.3d 1545 (9th Cir. 1994). We further note that the Ninth Circuit has consistently held that when the lower court's order raises new and important problems, or issues of law of first impression, as here, that factor weighs in favor of issuance of the writ. See, *San Jose Mercury News v. United States Dist. Court*, 187 F.3d 1096, 1099 (9th Cir. 1999); *Executive Software North America, Inc. v. United States Dist. Court*, 24 F.3d 1545, 1551 (9th Cir. 1994). Indeed, in "supervisory mandamus" cases, involving questions of law of first impression, and therefore of major importance to the administration of the lower courts, as here, a petitioner need only show that the court committed ordinary, as opposed to clear, error. *Calderon v. United States Dist. Court*, 134 F.3d 981, 983 (9th Cir. 1997).

Nemesis' remaining arguments are that this Court lacks the power to enter a fee award when a Circuit Court, mandated by law to do so, refuses to do so; and that the equitable doctrine of laches should prevent the Court from giving the relief requested. See, Opposition Brief, pp. 4, 7. Neither of these contentions are correct or supported by the cases cited. First, this Court plainly has the power to issue a writ of mandamus to direct the Circuit Court to give a reason for any decision which is apparently erroneous or, in default of such, to comply with the law. See generally, cases cited in Petition, pp. 17 – 18.[9] Second, the petition here was filed approximately four months after denial of the motion for reconsideration and for partial recall of the mandate. This is not materially later than the three months which would have been allowed for the filing of a petition for certiorari, unavailable here. The filing of a petition for

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[9] The next step, determining *the amount* of such award, is certainly, initially, a matter for the Circuit Court's discretion.

mandamus is not constrained by any formal time-limits, other than the doctrine of laches. The fundamental issue in laches is whether any prejudice has resulted from the delay in question. As it has been said: "if [the] question is reviewable at all by mandamus, it should be presented with such dispatch and under such circumstances that grievous personal hardship is avoided or minimized." *United States v. Carter*, 270 F.2d 521, 524 (9th Cir. 1959). Nemesis has failed to identify any legal prejudice, let alone "grievous personal hardship" as would bring the doctrine of laches into play and preclude review.

Conclusion

In sum, Nemesis' Opposition Brief does little more than reinforce the fact that there appears to have been no logical, legally permissible reason for the Eleventh Circuit to have acted as it did, and emphasize that mandamus should issue to remedy what appears to have been a clear abuse of discretion and usurpation of power.

Respectfully submitted,

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Dated: October 2, 2003